

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554**

)	
In the Matter of)	
)	
Connect America Fund)	WC Docket No. 10-90
)	
A National Broadband Plan for Our Future)	GN Docket No. 09-51
)	
Establishing Just and Reasonable Rates for Local Exchange Carriers)	WC Docket No. 07-135
)	
High-Cost Universal Service Support)	WC Docket No. 05-337
)	
Developing an Unified Intercarrier Compensation Regime)	CC Docket No. 01-92
)	
Federal-State Joint Board on Universal Service)	CC Docket No. 96-45
)	
Lifeline and Link-Up)	WC Docket No. 03-109
)	
Universal Service Reform – Mobility Fund)	WT Docket No. 10-208
)	

**METROPCS COMMUNICATIONS, INC. REPLY TO HYPERCUBE OPPOSITION TO
PETITIONS FOR RECONSIDERATION AND/OR CLARIFICATION**

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**METROPCS COMMUNICATIONS, INC. REPLY TO HYPERCUBE OPPOSITION TO
PETITIONS FOR RECONSIDERATION AND/OR CLARIFICATION**

MetroPCS Communications, Inc. (“MetroPCS”),¹ by its attorneys, hereby submits its
reply to the HyperCube Telecom, LLC (“HyperCube”) Opposition² to MetroPCS’ Petition for

¹ For purposes of this Petition, the term “MetroPCS” refers collectively to MetroPCS Communications, Inc. and all of its FCC-licensed subsidiaries.

² Consolidated Opposition of HyperCube Telecom, LLC To Petitions for Reconsideration and/or Clarification, in WC Docket Nos. 10-90, 07-135, 05-337, GN Docket No. 09-51, CC Docket No. 01-92 (filed Feb. 9, 2012) (“*HyperCube Opposition*”).

Clarification and Limited Reconsideration (“*Petition*”)³ of the Commission’s *Order* reforming intercarrier compensation and universal service.⁴ In reply, the following is respectfully shown:

I. INTRODUCTION AND SUMMARY

MetroPCS’ *Petition* requests that the Commission clarify or modify its rules relating to traffic stimulation in order to prevent traffic pumpers from circumventing the Commission’s clear intent to eliminate uneconomic traffic. The Commission found that traffic pumping “result[s] in a jump in revenues and thus, inflated profits that almost uniformly make the LEC’s interstate switched access rates unjust and unreasonable under Section 201(b) of the Act.”⁵ Indeed, the Commission noted in the *Order* that “access stimulation imposes undue costs on consumers, [and] inefficiently divert[s] capital away from more productive uses such as broadband deployment.”⁶ The Commission also recognized the impact that these traffic pumping schemes can have on competition, as they give companies that offer a “free” calling service a competitive advantage over companies that charge their customers for the service.”⁷

MetroPCS and many others in the industry repeatedly have demonstrated that traffic stimulation has escalated in the past several years from a recurring problem to a major industry

³ Petition of MetroPCS Communications, Inc. For Clarification and Limited Reconsideration, in WC Docket Nos. 10-90, 07-135, 05-337, 03-109; GN Docket No. 09-51; CC Docket Nos. 01-92, 96-45; WT Docket No. 10-208 (filed Dec. 29, 2011) (“*MetroPCS Petition*”).

⁴ *In the Matter of Connect Area Fund: A National Broadband Plan For Our Future; Establishing Just and Reasonable Rates for Local Exchange Carriers; High-Cost Universal Service Support; Developing an Unified Intercarrier Compensation Regime; Federal-State Joint Board on Universal Service; Lifeline and Link-Up; Universal Service Reform – Mobility Fund*, WC Docket Nos. 10-90, 07-135, 05-337, 03-109, GN Docket No. 09-51, CC Docket Nos. 01-92, 96-45, WT Docket No. 10-208, Report and Order and Further Notice of Proposed Rulemaking, FCC 11-161 (rel. Nov. 18, 2011) (the “*Order*”).

⁵ See *Id.* at ¶ 657.

⁶ *Id.* at ¶ 663.

⁷ *Id.* at ¶ 665.

concern involving wide scale fraud. This is particularly threatening to carriers such as MetroPCS, who offer affordable service on an unlimited paid-in-advance, tax-inclusive, flat-rate basis, because fixed monthly carriers cannot pass excessive termination charges on to their customers as easily as usage-based carriers – who are positioned to meter and bill for services after the fact. Indeed, it appears to MetroPCS that a number of traffic pumping schemes are targeting carriers with all-you-can-eat service models. To further support its requests for clarification and/or reconsideration of certain access stimulation regulations, the MetroPCS’ *Petition*, presents numerous examples of traffic pumping situations, and in doing so, provides the Commission with first-hand knowledge of real-life arbitrage schemes that might continue to occur despite the adoption of the Commission’s *Order*. Furthermore, MetroPCS provides evidence that traffic pumpers previously have proven to be adept at finding loopholes in the Commission’s rules, and filed the petition to warn the Commission of possible loopholes in the adopted rules.

In opposition to MetroPCS’ *Petition*, HyperCube mischaracterizes several of MetroPCS’ requests as “merely speculative,” as requests for “special treatment” from the Commission. Hypercube also suggests that MetroPCS’ requests would result in micromanagement by the Commission. This simply is not true. MetroPCS’ requests are designed to enable the Commission reach its stated goal of deterring traffic pumping schemes and avoiding potential unintended consequences caused by the *Order*. If the Commission does not address MetroPCS’ concerns, traffic pumping activities are likely to morph from the current schemes into the new schemes MetroPCS identifies. With respect to clarifications or modifications that MetroPCS is requesting, HyperCube fails to provide relevant evidentiary support for its assertions. Accordingly, as set forth in greater detail below, HyperCube’s arguments are without merit, and should be dismissed by the Commission.

II. THE COMMISSION MUST ADDRESS TRAFFIC STIMULATION PRACTICES THAT OCCUR WITHIN THE INTRASTATE ACCESS MARKET

MetroPCS' *Petition* requests that the Commission reconsider and broaden its rules to prohibit traffic stimulation in the intrastate access market, including intrastate, interMTA traffic.⁸ MetroPCS' concern is that, by only addressing traffic stimulation for local reciprocal compensation and *interstate* traffic, the *Order* leaves wide open the possibility for traffic pumping activities in the *intrastate* exchange context.⁹ Indeed, MetroPCS is already starting to see carriers in states with multiple MTAs start to take advantage of this gap in the Commission's rules. The same concerns that the Commission – and carriers alike – have with respect to traffic stimulation in the local reciprocal compensation and interstate access contexts, apply equally to intrastate access stimulation as well. Regardless of the context, traffic stimulation schemes “impose an additional burden on wireless carriers, drain governmental resources, and create uncertainty regarding the treatment of traffic termination.”¹⁰ Although the Commission has taken steps to remedy this problem in the reciprocal compensation and interstate access contexts, MetroPCS urges the Commission to include intrastate access traffic within the regulations established by the *Order*.

HyperCube claims that the Commission does not need to address traffic stimulation in the intrastate access context because MetroPCS' concerns are “mere speculation.” This is simply false. MetroPCS stated several times in its *Petition* that “MetroPCS already has seen evidence of

⁸ *MetroPCS Petition* at 16.

⁹ *Order* at ¶ 662.

¹⁰ Letter from Scott K. Bergmann, CTIA, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 07-135 (filed Nov. 24, 2010).

traffic stimulation within the intrastate access marketplace.”¹¹ Further, MetroPCS also pointed out that traffic pumpers previously “have not hesitated to exploit omissions, or loopholes, in the Commission’s rules”¹² and there is no indication that traffic pumpers will change their ways now. The *Order* was designed to adopt a uniform intercarrier compensation scheme to address both current problems as well as future problems. Given that it has taken over 10 years to address the concerns in the *Order*, the Commission must address the issues that are raised now – or else it will encourage traffic pumpers. If the Commission bypasses this opportunity to address these issues, its well-crafted balances in the *Order* will be at risk. Accordingly, the Commission should address this next wave of arbitrage before it becomes the next significant problem the Commission must address. The Commission repeatedly has expressed its desire to reduce arbitrage, and closing this gap and applying access stimulation rules to intrastate traffic will help accomplish its goal and would certainly be in the public interest.¹³

III. POTENTIAL LOOPHOLES STILL EXIST WITH RESPECT TO THE MANNER IN WHICH THE 3:1 TRAFFIC IMBALANCE IS TO BE CALCULATED

HyperCube also opposes MetroPCS’ request for clarification of the manner in which the 3:1 traffic imbalance component of the access stimulation definition is to be applied.

MetroPCS’ *Petition* sought clarification that “a carrier cannot defeat the 3:1 traffic imbalance

¹¹ *MetroPCS Petition* at 18.

¹² *Id.*

¹³ HyperCube also submits a jurisdictional argument stating that this matter would be subject to state jurisdiction for non-CMRS traffic. This argument does not apply to the scope of MetroPCS’ comments. First, non-CMRS traffic is not at issue here. The *MetroPCS Petition* explicitly refers to intrastate, interMTA CMRS traffic throughout the relevant section. And, second, HyperCube once again fails to provide *any* authority for its assertion, and merely just states facts without any statutory or regulatory evidence. Further, it should be noted that as MetroPCS previously has stated, the Commission has correctly identified Section 332 of the Act to provide it with proper authority to regulate intrastate access traffic exchanged between LECs and CMRS providers. *MetroPCS Petition* at 17.

standard merely by offsetting a one-way business plan in one discrete line of business that generates high volumes of outbound traffic only”¹⁴ with another one-way business plan in another discrete line of business. MetroPCS later reiterated its request for this clarification in an *ex parte* meeting with Commission staff,¹⁵ which HyperCube incorrectly interprets to be “ICC micromanagement [that] the Commission already rejected.”¹⁶ This misunderstands the issue and the remedy sought. As MetroPCS fully explained in its *Petition*, this request stems from its own direct involvement in a particular situation that raises this precise issue as MetroPCS has witnessed first-hand the ability of carriers to evade this prong of the access stimulation test.¹⁷ MetroPCS acknowledged that “the Commission wisely included within the test for access stimulation a criterion that the LEC have ‘an interstate terminating-to-originating traffic ratio of at least 3:1 in a calendar month.’”¹⁸ MetroPCS continued to explicitly state its support of this test, commending the Commission for taking this action. However, it also warned the Commission of possible loopholes that may still exist with respect to arbitrage opportunities – both now and in the future. Such a clarification is necessary to “deter all uneconomic traffic stimulation business plans, even if they are crafted as two distinct one-way models.”¹⁹ This real-world access stimulation issue must be addressed by the Commission.

¹⁴ *MetroPCS Petition* at 13. The lines of business that MetroPCS believes the Commission should use are reciprocal compensation, intrastate access, and interstate access, with originating and terminating traffic also considered separately.

¹⁵ See Letter from Carl Northrop, Telecommunications Law Professionals PLLC, to Marlene H. Dortch, Secretary, FCC at 2, WC Docket No. 10-90 *et al.* (filed Jan. 27, 2012).

¹⁶ *HyperCube Opposition* at 14, n. 43.

¹⁷ *Id.* at 13 -14.

¹⁸ *MetroPCS Petition* at 13 (quoting the *Order* at ¶ 656).

¹⁹ *Id.* at 14.

HyperCube also mischaracterizes MetroPCS' requests to clarify other potential access stimulation loopholes as self-serving – aimed to only benefit MetroPCS. This, again, is not true. HyperCube argues that MetroPCS' proposed threshold is too narrow and would establish a “heads I win, tails you lose” situation benefiting carriers such as MetroPCS. HyperCube remarks that “MetroPCS cannot expect to receive special treatment, however, merely because it has elected to market its services on a flat rate basis.”²⁰ This assumption is incorrect. Although it is true that traffic pumping schemes often disproportionately disadvantage flat-rate, unlimited usage carriers, MetroPCS does not expect to receive special treatment due to its decision to employ a certain business model- one that almost all mobile wireless service providers use – and did not offer any reason for HyperCube to claim otherwise. Again, HyperCube is confusing MetroPCS' inclusion of an example,²¹ provided solely to demonstrate potential loopholes and further support its request, with a ploy to “trick” the Commission. Traffic stimulation schemes raise the costs for *all* consumers because the costs are hidden within the charges giving rise to the traffic stimulation changes. For example, the original carriers who raised this issue were interchange carriers *who charge usage by the minute*. The issue they had is that they were required by the Commission's Rate Integration Order to not charge more for calls to high cost numbers than to low cost numbers. Traffic stimulators took advantage of this by sending more traffic to high access cost numbers which the interchange carriers could not pass through. This clearly demonstrates that access stimulation is not solely the purview of flat rate carriers and these issues will affect even usage based carriers. While, traffic stimulation schemes are not highly publicized – they are not discussed on the front page of the Washington Post, or being

²⁰ *HyperCube Opposition* at 15 n. 45.

²¹ “Traffic Stimulators were buying multiple MetroPCS phones and using them in connection with auto-dialers to generate high volumes of calls to certain LECs with high termination rates,” *MetroPCS Petition* at 15.

debated on the House floor – they remain problems that all carriers, but especially, small, rural and mid-tier carriers, that offer unlimited “all-you-can-eat” plans, are facing each and every day. The Commission expressed its intent to end such schemes in its *Order*, and the clarification requested by MetroPCS will further help the Commission reach its goal. Indeed, by arguing against the clarification suggested by MetroPCS, Hypercube is confirming MetroPCS’ suspicions – that certain carriers are already looking for ways to engage in access stimulation outside of the Commission’s rules by exploiting potential loopholes. Hypercube is unable to provide any legitimate explanations as to why it would be in the public interest to allow access stimulation to occur in this context. Thus, HyperCube’s argument is wholly without merit, and the Commission should adopt MetroPCS’ proposal.

IV. A “CLEAR AND CONVINCING” STANDARD OF PROOF REQUIRED TO REBUT AN ACCESS STIMULATION COMPLAINT IS NOT UNDULY BURDENSOME

MetroPCS also requested that the Commission provide additional guidance on the complaint process associated with access stimulation. Specifically, MetroPCS requested that the Commission clarify that clear and convincing evidence is required to overcome a *prima facie* case of traffic imbalance if the complaint is based upon the complaining carrier’s own traffic data. In doing so, the terminating LEC will have the opportunity to rebut such a complaint by demonstrating that the carrier-to-carrier data does not constitute a traffic stimulation scheme directed at the complaining carrier.

HyperCube argues that this clarification would impose undue and anticompetitive burdens on challenged carriers and instead, the Commission’s “self-effectuating” remedy should be sufficient. However, MetroPCS submits that such a remedy may not be sufficient to protect against situations in which carriers adopt access stimulation schemes that are directly specifically

against a particular carrier – a situation MetroPCS has experienced first-hand. MetroPCS’ *Petition* anticipates certain disputes that might arise based on prior experiences, and its proposed solution would avoid such issues. HyperCube argues that such a burden of proof would “expose a carrier to harassment and unnecessary effort and expense merely because the carrier engaged in revenue sharing.”²² However, MetroPCS submits that this just might be the incentive that will prevent those carriers from engaging in such practices. Knowing the expense and harassment that awaits a potential traffic pumper on the other side of a complaint might make such a carrier think twice before engaging in such fraudulent activity. Further, it is not entirely clear how a mere clarification of the burden the alleged traffic pumper has to meet to overcome the *prima facie* case will cause harassment because it does not address what the complaining carrier has to show in the first instance. In order to bring a *prima facie* case the carrier has to show that the traffic is imbalanced. If they have the facts, they will bring the complaint irrespective of the burden on the traffic pumper.

V. CONCLUSION

The *HyperCube Opposition* provides little – to no – support for its arguments pertaining to MetroPCS’ *Petition*. MetroPCS supports the Commission’s goal of reducing arbitrage and lends its experiences and recommendations to hopefully provide a solution that will benefit carriers and consumers alike. Indeed, throughout its *Petition*, MetroPCS provides real world examples to demonstrate that unprincipled carriers may be in a position to take advantage of the loopholes that remain within the access stimulation regulation, and submits recommended clarifications and modifications to assist in ending such practices. HyperCube, however, views these recommendations as merely self-serving requests – something that is just not true.

²² *HyperCube Opposition* at 17.

MetroPCS' requests for clarification are intended to help the Commission close loopholes, avoid unintended consequences and create a scheme that requires less adjustments in the near term. Indeed, by protesting MetroPCS' suggestions, HyperCube is demonstrating that certain carriers are already looking for ways to exploit perceived loopholes in the Commission's *Order*. The Commission should reject Hypercube's self-serving arguments, and adopt MetroPCS' proposed requests for clarification as being in the public interest.

Respectfully submitted,

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February 21, 2012

CERTIFICATE OF SERVICE

I, Jessica DeSimone, do hereby certify that on this 21st day of February 2012, I caused a copy of the foregoing **METROPCS COMMUNICATIONS, INC. REPLY TO HYPERCUBE OPPOSITION TO PETITIONS FOR RECONSIDERATION AND/OR CLARIFICATION** to be served on the following via First-Class Mail, postage pre-paid:

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